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No. 3[illegible]

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

THADDEUS G. BENTON AND J. LAMAR BUTLER,
Petitioners,

v.

GLENN McCARTHY, GLENN McCARTHY, INC., AND WILLIAM McCARTHY, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Your petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in the above entitled cause entered on April 29, 1960.

OPINIONS OF THE COURTS BELOW

The opinion of the United States Court of Appeals is quoted in full in the Statement of the Case, *infra*, p. 5, and in the Appendix, p. 1a. It is not yet reported in Federal 2d. That court's denial of appellants' petition for rehearing is quoted in the Appendix hereto, p. 3a, and it is not reported in Federal 2d.

The opinion of the United States District Court for the Southern District of New York is quoted in the Appendix and Brief for Appellants (R. 2030, Blue Cover) and is not yet reported in the Federal Supplement 2d.

JURISDICTION

The date of the judgment sought to be reviewed is April 4, 1959, and the time of its entry was April 29, 1960, upon denial of petition for rehearing. This Court by order entered July 22, 1960, extended the time in which petitioners may file this petition to August 9, 1960.

Section 1254 of Title 28 of the United States Code confers authority on this Court to review the judgment in question by writ of certiorari.

QUESTIONS PRESENTED

1. Whether the United States Court of Appeals ignored, disregarded, and failed to apply and enforce the applicable laws of New York State and Texas as declared by the Court of Appeals of New York, the courts of Texas and other state courts, and this Court, as the rule of decision, in violation of petitioners' Constitutional rights as established by this Court in *Erie* v. *Tompkins*, 304 U. S. 64, 82 L. ed. 1188? The Court neglected to apply the laws of New York and Texas applicable to the construction of a contract made and performed in New York, viz, that the principal-owner cannot rely upon non-performance of a condition precedent to escape liability to the broker when its non-performance was caused by his own fault, and the principal rescinded the contract with the purchaser by the payment of liquidated damages for his breach of contract. Without any legal authority, the Court

failed to hold defendants liable to petitioners for a commission for procuring a purchaser of real estate on terms acceptable to defendants because liability for the commission was conditional upon the payment of the purchase consideration, notwithstanding the fact that the principal failed to perform the condition precedent upon which the payment of the purchase consideration depended, and rescinded the contract with the purchaser in consideration of the payment to the purchaser of liquidated damages valued at $135,000. so as to be free to seek a better contract with another purchaser.

The disregard of the compelling rule of decision required by *Erie* v. *Tompkins*, the conflict between the decision below and the rule of decision in New York, as approved by this Court, are the predominant reasons for issuing the writ in this case.

Subsidiary Questions

2. Where the material issues in this action were adjudicated by the trial judge without a jury adversely to petitioners, upon conflicting and perjurious testimony of a party defendant then under indictment for a felony and then in fact guilty thereof as adjudicated after the decision in this action, in the United States District Court for the Southern District of New York, and upon false and conflicting representations to the Court by defendants' attorney who was also convicted as a co-defendant with such defendant in the said criminal proceeding, is the action ripe for reversal of the judgment or for a new trial?

3. Whether the Court of Appeals' omission to disturb the trial judge's resolution of the conflict in favor of defendants that the commission was payable

only "if and when such moneys were actually received" ignored the fact of the absence of any credible evidence that the parties had agreed to any such condition as the trial judge found, in disregard of its duty to consider the sufficiency of the evidence as required by FRCP 52 (b)?

4. Are defendants liable to petitioner Benton as well as to his co-broker, petitioner Butler, as matter of law?

5. Did the courts below err as matter of law in holdthat the individual principal and controlling stockholder of defendant corporation (Glenn McCarthy) is not jointly and severally liable with respondent corporation to petitioners—despite the fact that he acted in his individual capacity as the record owner of the concession, and in obligating himself to pay the commission?

STATUTE INVOLVED

Section 34 of the Federal Judiciary Act of September 24, 1789, Chapter 20, as amended, 28 U. S. C. section 1652 is as follows:

> "*State Laws as rules of decision.* The laws of the several states, except where the Constitution or treaties of the United States or acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." (June 25, 1948, c. 646, 62 Stat. 944)

STATEMENT OF CASE: THE MATERIAL AND CONTROLLING FACTS

The basis of Federal jurisdiction in the District Court of the United States for the Southern District of New York is the diversity of citizenship of the parties plaintiff and parties defendant, the controversy

involving over $3,000 at date of action in 1955. Section 1332, Title 28 U. S. Code.

Facts Applicable to Question 1.

Butler is a lawyer of California; he was engaged in oil and gas matters for four years preceding the trial of this action. (R. 39-40, 309). Benton is a member of the bar of the District of Columbia and New York, experienced in the oil industry. (R. 398-490A, 450.

The opinion of the United States Court of Appeals is here quoted in full, as it expressly found the ultimate, controlling facts which compel the relief sought (App. 1):

> "Defendant Glenn McCarthy, the owner of an oil and gas concession in Bolivia, desired to obtain financing for the development of the concession through the sale of an undivided interest in the lease. Such an agreement was entered into by defendant corporation and Keljikan Commercial Corporation, *which purchaser was obtained through plaintiffs' efforts.* The defendants, however, were unable to procure guarantees from the Mutual Securities Agency against expropriation of the lease or as to conversion of the profits from Bolivian to American currency, *as was contemplated (required) by the agreement.* Hence, the agreement was terminated without any payment being made by Keljikan. (Parenthetical insert supplied, see infra, p. 9).
>
> "Plaintiffs allege an oral commission contract under which they were to receive a 10 per cent "carried" interest in the enterprise, plus 5 per cent of the purchase price. *Defendants' position is that the commission promised was a reasonable percentage of the financing obtained,* payable if and when such moneys were actually received. The District Court concluding that the "plaintiffs'

version of the transactions is not credible in the light of all the evidence and all of the facts and circumstances", found for the defendants.

"On this appeal, plaintiffs recite at some length the evidence adduced at the trial in an attempt to overturn the findings below. They have, however, succeeded only in demonstrating the *conflicting nature of the testimony.* Hence Judge Bryan's findings of fact cannot be found "clearly erroneous", F. R. 52 (a); and we can find no reason to disturb his resolution of the conflict in favor of the defendants. *The terms of the express contract found by the judge, conditioned upon the actual receipt of the financing payments by the defendant corporation, exclude any possibility of recovery in quantum meruit.*

Judgment affirmed." (Emphasis supplied)

The findings of the District Court are found in petitioners' "Appendix and Brief for Appellants" in blue cover, R. 2029-2059. Such findings are argumentative, and bear obvious adversary position to petitioners in attempted justification therefor, in total disregard of the inconsistent, contradictory, false and perjurious testimony by Glenn and William McCarthy, and the misrepresentations to the court by defendants' attorney, Mr. Mittelman, as so clearly shown in the Brief for Appellants in the Court of Appeals and Appellants' Petition for Rehearing in that court.

Petitioners assert with complete confidence that the findings that defendants' obligation under the express contract was conditioned upon the actual receipt of the "financing payments" is gross and clear error, and contrary to the only credible evidence in the record. But for the purpose of this petition petitioners will

assume that such was the condition of the contract, and show that the condition is not operative on the uncontradictable facts by compulsion of the New York rule of law.

The last full sentence of the opinion is illogical, totally inconsistent and erroneous, and without any support in law, and is in disregard of the New York law, based on the admitted facts that defendants' fault caused the nonperformance of the condition precedent to liability for the commission, viz. the consummation of the contract of sale. The court having expressly recognized the express contract of the parties, quantum meruit could not be a test, for that arises only upon a *quasi* contract. The issue is whether the express contract is enforceable as if the financing payments had in fact been received by defendant corporation because defendants' fault caused the nonpayment of the purchase price.

The Court of Appeals simply substituted its personal philosophy without basis in law, for the universal rule of law.

The court's conclusion, acknowledging the existence of an *express contract*, evidences (a) the disregard and violation of the New York and Texas rule of law,—the universal rule—that defendants cannot rely upon the non-performance of the condition precedent to their liability because their own faults and acts caused nonperformance of the condition precedent, which is conclusive on the admitted facts; (b) the disobedience to the opinion of this Court in *Erie v. Tompkins, supra*, and numerous opinions of this Court to the same effect; and (c) the denial to petitioners of their Constitutional rights.

The Court of Appeals found, as was defendants' admitted position, that "the commission promised was a reasonable percentage of the *financing obtained*, payable if and when such moneys were actually received." The court thus found an *express contract* to pay a "reasonable percentage of the financing *obtained*"—hence petitioners were not relegated to reliance upon a quasi contract or quantum meruit as the Court of Appeals mistakenly assumed. Such express contract finds written confirmation in defendants' registered letter to Butler of June 20, 1955 written concurrently with the execution of the written agreement with Keljikan Commercial Corporation, in which Glenn McCarthy confirmed his *individual* undertaking to pay Butler "the usual and customary finder's fee." (Pls.' Ex. 6, App. 3a, District Court's finding, R. 2049)

The District Court expressly found:

> "The *understanding always was* that Butler was to receive compensation by way of commissions of a reasonable amount, payable progressively upon the receipt of actual payments by Glenn McCarthy, Inc. from the proposed financier." (R. 2049)

The Court's finding that defendants were unable to procure the required guarantees from the Mutual Securities Agency against expropriation of the lease or as to the conversion of the profits from Bolivian to American currency, and that defendants terminated the agreement with Keljikan Commercial Corporation without any payments being made by Keljikan, is conclusive that defendants failed to perform the alleged condition, precedent to the payment of the purchase consideration, which they were bound to perform. Implicit in the finding is the recognition that it was

defendants' fault and failure to comply with the conditions precedent that caused the omission to pay the purchase consideration, which omission was the purchaser's right. The District Court had held:

> "However, Glenn McCarthy, Inc. was unable to comply with these conditions within a reasonable time after the execution of the contract." (R. 2038)

That defendants were bound to procure such guarantees as a condition precedent to the payment of the purchase consideration is conclusively established by the fact that the agreement of sale of June 20, 1955 provided that defendants "SHALL PROCURE" such guarantees (Pls.' Ex. 13, Part IF), whereas the earlier draft contract had provided merely that defendants should use their *best efforts* to procure the guarantees. (Defs.' Ex. G, p. #3)

Defendants' termination of the contract with Keljikan was not due merely to their fault and inability to perform. Defendants had the greedy purpose to seek greater financing and profit through Anaconda Copper Company, and to achieve that objective they had to be free of their obligation to Keljikan Commercial Corporation. (App., R. 2039)

So, to gain freedom of liability to Keljikan Commercial Corporation, defendants bought from it a release of liability, paying therefor a $\frac{1}{8}$ carried interest in the concession which it later sold for the equivalent of $135,000. (Pls.' Ex. 16; Defs.' Ex. D, App. 4a, R. 790-91, 804-5, 1242)

Defendant corporation thereupon, being free of commitment to the Keljikans, contracted on April 30, 1956 with Anaconda's subsidiary to sell it natural gas, but

additional capital of $5,000,000 would have been required to drill sufficient gas wells to warrant building a pipe line across the Andes at a cost of $30,000,000 (R. 785-7; Defs.' Ex. F, R. 797). Defendant Corporation hoped thereby that it could borrow the additional required capital, but failed. (R. 799-800). The ambition of McCarthy failed; and he had lost the benefits of the Keljikan contract with which he failed to comply.

Such admitted and uncontradictable facts demonstrate that defendants, by their own fault and breach of undertaking to Keljikan, and desire for greener pastures, and their buying freedom from the Keljikans, caused the non-performance of the condition precedent to liability for the commission to petitioners, which conduct fastens liability upon defendants for the commission as if the condition precedent had been fulfilled.

Lex Loci Contractus
Place of Performance

While the District Court found what "the understanding always was" (App., R. 2048), neither that Court nor the Court of Appeals found specifically where the contract-understanding was made. The District Court found conversations between Butler, William McCarthy, Cunningham (Glenn McCarthy's lawyer), and Glenn McCarthy regarding compensation. (App., R. 2032). They could have been only in New York State where the parties met.

The District Court noted that at the outset of the negotiations by McCarthy with the Keljikans in New York City he would not approve of the offering of only a 40% interest in the concession to the Keljikans. (App., R. 2051) Those conversations occurred only in New York City, for Glenn McCarthy's sworn answer

to written interrogatory No. 40 (R. 1401) shows that his *first meeting in New York City with Keljikan brothers when introduced by Butler "culminated in the execution of his contract with the Keljikans."* McCarthy further testified that he told Butler "from the beginning" in January or February in New York City that "we were not going to pay anything but the ordinary normal fees for such work" (R. 1912-1914). McCarthy had met the Keljikans in New York City in early May, 1955 by introduction of Butler. (R. 740-47, 888).

Glenn McCarthy's meetings with Butler were in New York City commencing in January, 1955 when he was engaged by McCarthy. (R. 42, 48, McCarthy, R. 840) Butler, from January through June, 1955 worked in New York City for McCarthy, at an expense of $20,000, spending all his time on the venture. (R. 230, 231). He testified that the commission would be payable when he brought defendants the purchaser and the contract of sale was signed. (R. 357).

Glenn McCarthy was engaged in New York City on several occasions in 1955, and as early as January, 1955 in seeking to finance the development of the concession, and met with all prospective financiers through Butler. (R. 551, 553, 571, 728-9, 844, 846, 1087, 1901, 1497).

Butler brought Glenn McCarthy and one Goodman, a prospective financier, together in New York City in May, 1955. (R. 99-100, 737-39.)

Butler's and Benton's services were rendered and performed in New York City, in creating the interest of Keljikan Commercial Corporation (R. 416-23)

which culminated in the execution of the contract of sale at Houston, Texas. (R. 1912-14)

Cunningham, McCarthy's attorney, had meetings with Butler in New York City throughout April, May and June regarding the desired financing. (R. 553-7, 1143, 1147-8, 1152-3, 1157-8, 1888) Cunningham assured Butler in New York City that if a transaction resulted with the Keljikans he was sure that reasonable compensation would be paid. (R. 1196)

The only other State in which the express contract found by the court could have been conceivably made with Butler, is Texas. The District Court found that defendants' promise to pay a reasonable commission for procuring the financing was conditioned on defendants' receipt of the purchase consideration, and that Glenn McCarthy made that plain to Butler in Houston, Texas, on their only meeting there on March 9, 1955 when commissions on a proposed transaction with another, one Pullman, were discussed. (App., R. 2048) Such latter finding was vigorously opposed by petitioners.

There can thus be no question that the express contract between the parties hereto was made and entered into in New York City, and modified in Texas if at all, and that the performance of the contract by petitioners occurred in New York City.

The rule of decision is, therefore, New York, or only conceivably in Texas; and the rule of decision in both states is identical, *infra*.

Facts Applicable to Subsidiary Question 2

The Court of Appeals held that petitioners had demonstrated "the conflicting nature of the testimony", but found no reason to disturb the trial judge's findings. The trial judge had held that on plaintiffs' version of the facts there was at least grave doubt as to whether Butler made out a prima facie liability and even greater doubt as to Benton; that insofar as the versions of the parties differ he found plaintiffs' version of the transaction (as to the promised commission of a ten per cent carried interest in the concession) is not credible in the light of all the evidence and all the facts; that it was inconceivable that defendants agreed to give each of petitioners a five per cent carried interest in the concession. Yet the trial judge acknowledged McCarthy's agreement to pay a reasonable commission for procuring financing of the concession, which they did. (R. 2047-48) The only controversy was as to the quantum of the commission, and when it would be earned, which the trial court found would be upon payment of the purchase consideration in contradiction of Butler's testimony that it was earned or payable upon his production of the financiers and the execution of the contract of sale. (Butler, R. 357)

The conflicting testimony consisted most largely of Glenn McCarthy's falsification of the facts, as set forth in "Appendix and Brief for Appellants" in the Court of Appeals (pp. 18-23, 59-73, in blue cover), and the falsification of the facts by William McCarthy as set forth in the Brief for Appellants in the Court of Appeals (Pp. 55-56; R. 1098-99, 1136-7, 1686).

The trial court was also undoubtedly influenced by false and inconsistent representations to the trial court

by Leo B. Mittelman, attorney for defendants, that there was not an iota of evidence that an "agreement was made with Glenn McCarthy" (R. 1275-6), in violation of the Federal criminal statute, section 1001 of Title 18 of the U. S. Code, contrary to the findings of the trial court and the Court of Appeals, contrary to Glenn McCarthy's testimony of his agreement to pay Butler the ordinary fees for such work (R. 1912-14), and, contrary to his affirmative declaration to the trial court that "we have never claimed that Lamar Butler is not entitled to compensation" (R. 578; admission of fact No. 47; R. 1241-42, R. 1900).

The findings of the trial court adverse to petitioners were induced largely not only by the conflicting and perjurious testimony of Glenn McCarthy, but by the perjurious testimony of William McCarthy, and the false declarations to the court by their attorney, Leo B. Mittelman,—both felons, as adjudicated after the trial of this civil action in the United States District Court for the Southern District of New York, as shown by certified judgments filed with the Clerk of this Court (App. 6a to 10a), of which this Court will take judicial notice.

Respondent William McCarthy was convicted on June 17, 1960 on his plea of guilty to the offense of using interstate telephonic communication in a scheme to defraud, using the mails in a scheme to defraud, and using the mails for sale and delivery of securities not registered with the SEC, and conspiracy to violate section 77 e (a) (1) and 77 e (a) (2) Title 15 U. S. C. —(Sec. 371, Title 18 U.S.C.) as charged in 37 counts. He was sentenced to 3½ years and fined $10,000 on count 50, and 3½ years on each of many counts, to

run concurrently, except that on four counts the sentence is to run consecutively. The sentence as to additional counts was suspended, and the defendant placed on probation at the expiration of the first prison sentence, on condition that he not engage directly or indirectly in the sale or marketing of securities or hold any position of a fiduciary nature.

Respondent, Mittelman, the lawyer for defendants in this action was convicted by the jury of using the mails in a scheme to defraud, Title 18, sec. 1341 and 2 U. S. C., conspiracy to violate 77 e (a) (1), 77 (e) (a) (2) and 77 x T. 15 U. S. C. He was sentenced to five years imprisonment on count 2 and five years and fined $10,000 on count 50, the prison sentences to run concurrently. He was placed on probation for five years upon the expiration of the first term of five years on condition that he not engage directly or indirectly in the sale or marketing of securities or hold any position of fiduciary nature.

If the common law rule and the Revised Statutes of New York prevailed, and defendant William McCarthy and his attorney Mittelman had been convicted at the time of this civil trial, they would have been disqualified as witnesses in this action. Under the present New York statute (Sec. 2444 Penal Law, McKinney's Consolidated Laws of New York Ann., Book 39, Part 2) while they would be permitted to testify, the weight of their testimony and declarations to the Court would have been subject to attack, and substantially destroyed.

As William McCarthy and Mittelman were in fact guilty of their crimes when they testified, and made false and contradictory representations to the trial

court in this action, their testimony was not worthy of belief and contributed to the conflict in the testimony of the witnesses, including the perjurious testimony of Glenn McCarthy, and resulted in the unfortunate resolution of the trial court, unwittingly and wrongfully in defendants' favor.

Such facts alone, if not the violation of *Erie* v. *Tompkins* which should be all sufficient for the issue of the writ, warrant the review of the decisions below, and their reversal.

Facts re Question 3

The United States Court of Appeals erred in not disturbing the trial judge's resolution of the conflict in favor of defendants that the commission was payable only "if and when such moneys (the purchase consideration) were actually received" by defendants. It merely held that petitioners succeeded in demonstrating the *conflicting nature of the testimony*, that the trial judge's findings cannot *therefore* be found "clearly erroneous", and that "we can find no reason to disturb his resolution of the conflict in favor of the defendants."

Such negative conclusion of the Court of Appeals, without an analysis of the facts of the conflicting nature of the testimony, and without analysis of the perjury committed by the individual defendants, and the misrepresentations of facts made by their attorney, is a lame conclusion upon its duty to consider "the sufficiency of the evidence to support the findings" as required by Federal Rule of Civil Procedure 52 (b), in the light of the glaring perjury by defendants Glenn and William McCarthy, the glaring misrepresentations to the court by their attorney, Mittelman, in violation

of the penal statute, sec. 1001, Title 18, U. S. C., and the fact that William McCarthy and defendants' attorney, Mittelman, were thereafter convicted of felonies of which they were in fact guilty at the time of their testimony.

The failure of the Court of Appeals to resolve factually the question of whether defendants Glenn and William McCarthy perjured themselves, and whether their attorney Mittelman made false representations to the trial court, material to the decision, is the best proof that the Court of Appeals abdicated its duty to really consider "the sufficiency of the evidence to support the findings" as treated fully in petitioners' brief in the Court of Appeals (blue cover, with Appendix) required by F. R. 52 (b).

The court's mere conclusion that, because petitioners proved the conflicting nature of the testimony, the trial court's findings cannot be found to be "clearly erroneous" is a non sequitur, and evidences the total failure of the court to adjudicate the issue.

The Court's omission to disturb the trial court's finding that the commission was payable "if and when such moneys were actually received" ignores the absence of any credible evidence that the parties had "agreed" to any such condition as the trial court found; and its recognition of the conflicting evidence and its failure to point to any credible evidence supporting the finding is conclusive that it abdicated its function to weigh the sufficiency of evidence to support the finding.

Petitioners contend that the findings were "clearly erroneous", and show that this Court stands in the same position as the United States Court of Appeals

with power to determine the issue, and to consider the sufficiency of the evidence. *U. S.* v. *Gypsum Co.*, 333 U.S. 364, 92 L. ed. 743; *McAllister* v. *U. S.*, 348 U.S. 19; *U. S.* v. *Oregon State Med. Soc.*, 343 U.S. 326.

Absent the valueless and unbelievable testimony of William and Glenn McCarthy, the record is void of evidence that could sustain the finding of the trial court that the promise of the commission was conditional upon the receipt of the purchase consideration. The record is thus barren of any "sufficiency" of credible evidence to support the finding, the finding is contrary to the affirmative evidence of petitioner Butler, and the finding is thus clearly erroneous.

The remedy for relief from perjurious testimony is for appeal to the appellate court, if time for a motion for new trial has expired, as here. *Steel* v. *Smelting Co.*, 106 U.S. 453.

Facts re Subsidiary Question 4, re Liability to Benton:

The District Court further found:

> "The only understanding of any kind which Glenn McCarthy, Inc. had with respect to compensation or commissions was with Butler. It may be that if Butler had become entitled to any commissions, Benton might have been entitled to share in them, but Benton had no independent rights whatsoever against Glenn McCarthy, Inc. or the individual defendants arising out of these transactions." (App. 2049)

The right of petitioner Benton to recover is thus involved in question 1.

The defendants' contract of sale of the interest in the concession of June 20, 1955 expressly provided that,

> "Seller will pay any brokerage, commission or finder's fees which may be or become payable by reason of seller and purchaser *executing this agreement*." (Pls.' Ex. 13, R. 1473, App. 2035)

Defendants thus acknowledged their recognition that the commission was earned upon the execution of the purchase agreement, and not upon the payment of the purchase consideration as found by the court below. That acknowledgment is further confirmation of defendants' *express undertaking* to pay a normal commission for brokerage, and the brokers were Butler and Benton.

The District Court expressly found as to the procuring cause of the contract of sale that plaintiff Benton introduced the Keljikan Brothers to plaintiff Butler and that Butler introduced the Keljikans to the defendants. (App. 2035). That was in N. Y. City. The same Court of Appeals has held that the right to commissions is not lost because the broker does not participate in the negotiations, where the agreement was to pay the standard commission to the broker who made the sale. *Risser* v. *Hirshorn*, 199 F. 2d 917, 2nd Cir.

Benton is a proper co-plaintiff, as Butler had in writing promised him a five per cent undivided interest in the concession if it were the subject of financing by Keljikan Commercial Corporation (Defs.' Ex. A, Butler, R. 330-31, Benton, R. 401.) McCarthy's attorney, Cunningham, knew all about Benton's services as broker, which was sufficient knowledge to defendants, and they accepted the benefits of Benton's services with full knowledge. (R. 141, 339, 434-6, 472, 475, 1193-6, 1223-30, 1864, 1907-8, 1914-15). Butler on July 17, 1956 promised to share with Benton equally what-

ever he should receive for their services if Benton should not recover individually from defendants. (Pls.' Ex. 24)

Facts re Subsidiary Question 5, re Joint and Several Liability of Glenn McCarthy individually and Glenn McCarthy, Inc.

Glenn McCarthy was the individual owner of the Bolivian concession at the time of his dealings with Butler and of the execution of the sales contract of June 20, 1955 (R. 552); and title remained in him individually as late as September 29, 1955 (R. 554, 577).

Glenn McCarthy was at all times president, the controlling stockholder, and principal creditor of the corporation. (R. 548, 553).

It was Glenn McCarthy individually who assumed responsibility and liability to petitioners to pay the commission. He testified that "it was my agreement to pay" the commission and that I have always agreed that *I* was supposed to pay him a commission." (R. 607)

McCarthy testified that Butler "was not hired by DEFENDANT CORPORATION" (R. 1691); that "Mr. Butler was working for me as a broker" (R. 1674-76); and thus it is conclusive that he assumed liability personally.

In his only writings, Glenn McCarthy individually assumed the liability for the commission, first in his letter of March 9, 1955 to Butler's associate, Hardy & Keyes, in which transaction Butler was interested, w' n he wrote:

> "*I* hereby agree to pay you" etc. in the event "*I* or my company consummate a deal" (Pls.' Ex. 4, R. 735, R. 126-127);

and, secondly, in his letter of June 20, 1955 to Butler, written concurrently with the execution of the sales' contract of June 20, 1955, in which he confirmed that "*I* will pay you the usual and customary finder's fee", that "*I* am willing to pay the maximum fee" etc., thus confirming his individual undertaking to pay Butler the commission. (R. 2049; Pls.' Ex. 6, App. 3a)

In both writings, McCarthy signed them individually, and not as president of the corporation. He at all times acted as the individual Lord of all he surveyed, and was responsible individually for all he did.

He individually conducted all negotiations, and there is no evidence whatever of any authorization by defendant corporation of an undertaking to petitioners, excepting its ultimate acceptance of the benefits of their work, with full knowledge of resulting liability, jointly and severally.

The District Court's finding that Glenn McCarthy did not enter into any arrangement individually with petitioners is grossly and clearly erroneous.

REASONS FOR GRANTING THE WRIT

The predominant and impelling reasons why the writ should be granted are (a) the denial of petitioners' Constitutional right to have their contract rights determined according to the law of New York, or Texas, as required by this Court's opinion in *Erie* v. *Tompkins*, *supra*, and successive opinions; and (b) the departure from and conflict with the numerous decisions of this Court, its own prior good decisions, and decisions of the Court of Appeals of New York and Texas.

It was defendants' fault, breach of contract with the Keljikans, and greedy purpose of seeking financing

in greater sums from others than the purchaser obtained by petitioners that prevented the payment of the purchase consideration by the Keljikans and caused the cancellation of the contract of sale at a cost to defendants of the equivalent of $135,000. Hence, as defendants' fault and affirmative act of buying off the purchaser provided by petitioners, by reason of their failure to comply with their express undertaking, caused the non-performance of the condition precedent to defendants' liability to petitioners (i.e., the payment of the purchase consideration), defendants are as liable to petitioners as if the condition precedent had been performed.

This Court in *Erie* v. *Tompkins*, held that "the law to be applied in any case is the law of the state", whether by its "highest court in a decision is not a matter of federal concern." 304 U.S. 78. It held that any other rule would invade the rights "which in our opinion are reserved by the Constitution to the several states."

In diversity of citizenship cases, the construction of contracts and the rights and obligations of the parties are governed by state law. *Baumer* v. *Franklin Distilling Co.*, C.C.A. Ky., 1943, 135 F. 2d 384, certiorari denied 64 S. Ct. 54, 320 U.S. 750, 88 L. ed. 446; *Reed & Prince Mfg. Co.* v. *Lear, Inc.*, 78 F. Supp. 394, affirmed 174 F. 2d 208; *Russell* v. *Barnes Foundation*, 52 F. Supp. 827, affirmed 143 F. 2d 871, certiorari denied 65 S. Ct. 122, 323 U.S. 771, 89 L. ed. 616; *Risser* v. *Hirshhorn*, C. A. N. Y. 1952, 199 F. 2nd 917.

The rule of decision on the plain facts of this action, in New York and Texas,—if indeed not the universal rule as the Texas court noted (*infra*),—is:

Corpus Juris, Vol. 17, section 468:

"B Conditions Precedent

One who prevents the fulfillment of a condition precedent or its performance by the other party, may not take advantage of his act, and the performance of the condition is excused.

Where a contract is performable on the occurrence of a future event, there is an implied agreement that the promisor will place no obstacle in the way of the happening of such event, particularly where it is dependent in whole or in part on his own act; and, where he prevents the fulfillment of a condition precedent or its performance by the adverse party, he cannot rely on such condition to defeat his liability."

The New York Rule

The New York rule of law is firmly established by the Court of Appeals of New York, The Supreme Court of the United States, and the United States Court of Appeals for the Second Circuit.

In *Wagner* v. *Dorecktor*, 306 N. Y. 386, 118 N. E. 2d 570 (1954), the court reannounced the law to be:

"Over a century ago we reasserted the then well settled rule that a party cannot insist upon a condition precedent *when its non-performance has been caused by himself*. Young v. Hunter, 6. N.Y. 203, 207."

In that case the brokerage contract required the defendant to "split *the net proceeds of the sale of beef*," to be divided equally at the time the proceeds of the letter of credit were made available to defendant, *thus requiring a consummation of the contract and realization of "net proceeds" as a condition to the payment of*

the commission. The court held that the plaintiff could recover *if he showed that defendant's own wrong caused his non-performance of the contract of sale.* The court also noted that defendant's "own wrong" would include acts "committed with *a view to release him of his lawful obligation to plaintiffs . . .*". The decision applies perfectly to the facts in this case where the defendant failed to comply with the conditions it represented it could and would readily perform, and where it bought a release of its obligations to the Keljikans so that it would be free to negotiate a more favorable contract with others. Such purposes were the sole, direct cause of the non-performance by Keljikan Commercial Corporation of the alleged condition precedent *allegedly* imposed by the defendant corporation and Glenn McCarthy.

This Court settled the question that the seller's fault in not consummating the sale does not relieve him of liability for the commission:

Gaston, etc. Ltd. v. *Warner*, 260 U. S. 201 (1922), affirming 272 F. 56 (2nd circuit, 1921):

The broker was hired to obtain a purchaser for defendant's ship. The contract of sale to the purchaser was rescinded for inability of the seller to obtain a consent required from the British government. The court held that the owner's *inability to consummate the transaction was no defense* to the action for the commission, even if under British law the contract was void.

Dotson v. *Milliken*, 209 U. S. 237 (1908):

There the seller agreed that Milliken, the broker, would receive $2.50 per acre for each acre of land he

would sell at $20, the owner representing that a railroad had agreed to build a line onto the property upon which the broker and purchaser relied. The fact was developed that no such commitment to build the line had been obtained, and the transaction therefore failed. The broker had relied upon the owner's representations and obtained the ready purchaser (as on this appeal), and Justice Holmes held that the broker was entitled to his commission because the representations were not true. (On this appeal, the appellants and the purchaser had relied upon McCarthy's representation that he could readily obtain the required guarantees, and he bought off the purchaser for his breach of contract to free him to search for a still better deal, when he had suffered an inability to obtain the guarantees within any reasonable time.) The court cited the *Gaston* decision, *supra*, and *Willard* v. *Preston*, 92 F. 2d 851 (8th Cir., 1937).

The U. S. Court of Appeals for the Second Circuit had also conclusively applied the foregoing authorities:

Baldwin v. *Jardine Matheson & Co.*, 261 F. 861 (2nd Cir., 1919):

There the brokerage agreement was for the commission to be such *a sum of money as was RECEIVED in excess of $8.50 per box of tin plate*. The broker obtained a purchaser for 10,000 boxes at $9.25 per box. The seller refused to make delivery, feeling that he had to receive more money for the shipment, and that the buyer had to give cash or certified check. Agreement was reached on all terms, but afterward the seller notified the buyer that the sale was off because one of the representatives of the buyer had no right to bind the buyer, so they believed. The court held that even if

the representative did not have the authority, his acts were ratified. It expressly held:

> "There is no difference between failure to perform because of bad faith *or inability*" of the seller, (p. 865)

citing the *Dotson* decision, *supra.*

The further controlling New York decisions are:

Tanenbaum v. *Bochm*, 202 N. Y. 293:

There, defendant engaged plaintiff to find a long term tenant for defendant's property. Plaintiff did so. Defendant and the tenant agreed upon the terms of the lease. Defendant's attorney prepared the lease, defendant insisting upon summary proceedings rather than ejectment. It was held that the failure of closing was the defendant's fault, and that the plaintiff was entitled to his commission. The decision controls the instant appeal.

Mengel v. *Lawrence*, 276 App. Div. 180, 93 N.Y.S. 2d 443 (1st Dept. 1949):

There the broker was engaged to sell defendant's property for $130,000 cash. The broker procured the purchaser. Seller declined to consummate the transaction because of the purchaser's race or religion. Holding that the completion of the sale was prevented by defendant's action, the court said:

> "The defendant should not be permitted to take advantage of conditions precedent unperformed when she herself occasioned their non-performance."

citing *Sibbald* v. *Bethlehem Iron Co.*, 83 N.Y. 378.

Stern v. *Gepo Realty Corporation*, 289 N. Y. 274, 45 N.E. 2d 440 (1942): There the agreement to pay the

commission *was "in connection with the sale, WHEN AND IF CONSUMMATED . . .",*—the exact *alleged* condition precedent in this case. Because the seller did not remove certain taxes and encumbrances the buyers properly declined to consummate the transaction, as here, the declination being held to be justified. The court held that the seller could not contract to deliver title free of encumbrances, fail to remove them, cause the title to be rejected, and thus cause the loss of the commission to the broker. There, the court restated the rule to be that "*one may not take advantage of a condition precedent, the performance of which he has rendered impossible.*"

O'Hara v. *Bronx Consumers' Ice Co.*, 254 N. Y. 210, 172 N. E. 472 (1930):

The court there stated the facts and the decisive rule:

> "The defendant had breached its contract with the plaintiff. It had represented that there were no restrictive covenants which constituted an encumbrance upon the property when in fact there existed such an encumbrance. *It thereby prevented the sale which had been arranged by the plaintiff and was liable to him for the agreed commission.*"

In this action defendants had represented that they could readily obtain the guarantees, and their contract required that they "shall procure" the guaranties. They failed. They sought to make a better deal with Anaconda and others. Those acts prevented the consummation of the sale. They bought off the Keljikans from their breach of contract. They are liable for the commission. In the *O'Hara* case the Court of Appeals referred to the owner's "assumption of risk" in binding him to the broker.

Murray R. Realty Co. v. *Pres., Etc., of the Manhattan Co.*, 162 Misc. 21, 293 N.Y.S. 605 (App. T. 1st Dept.) (per Cur.), affirmed per curiam, 251 App. Div. 717, 298 N.Y.S. 176 (1937):

There, the seller attempted to change one of the terms in the proposed contract, which its representative had transmitted to plaintiff. The court held that the plaintiff could recover *notwithstanding the existence of a writing to the effect that no commission would be earned until title actually passed.* A leading decision of *Colvin* v. *Post*, 225 N.Y. 516, was cited. In that decision the Court of Appeals stated:

> "* * * The broker may if he chooses agree that if the sale fails through because of the seller's fault, he shall be entitled to nothing. Commonly, however, such is not the meaning of the parties, and the agreement should not be so construed unless such a result is clearly intended. (Seymour v. St. Luke's Hosp., 28 App. Div. 119; Larson v. Burroughs, 131 App. Div. 877) * * *
>
> "But if the sale fails *through the seller's fault*, a very different situation rises. We do not find expressed or implied in this contract any indication of an intention that in such event the broker shall lose what he has earned."

Holman v. *Patten*, 227 N. Y. 22, 124 N. E. 86 (1919):

Defendant requested plaintiff to obtain a loan for him on his real estate. As commission he promised to pay "8½ per cent on the amount of the loan." Defendant agreed to and attempted to furnish a title policy, but as it left one boundary line indefinite which could not be cured, the loan was not made. The court held that the broker could recover, saying:

> "The defendant did not perform the obligation on his part entitling him to the loan. Hanford did

> fully perform the obligation entitling him to the agreed compensation and expenses."

Any good faith of the borrower certainly was not deemed any basis for relieving him of liability for the commission.

Green v. *Foreman*, 53 N.Y.S. 2d 863 (Monroe Co., 1945):

Defendant promised the commission upon a sale by plaintiff, although it was not completed until after the termination of the agreement with the broker. The court held that defendant's failure to take steps to prove title was the sole reason why the sale and conveyance of the property was not completed with the purchaser produced by plaintiff, and that the broker was entitled to the commission. Similarly, in this appeal, the defendant McCarthy could not timely produce the guarantees which it had represented it could readily obtain; and, besides, McCarthy was ambitious to make a better deal with Anaconda and others, and bought off the Keljikans for his breach of contract.

The Texas Rule is the Same as New York

The Texas rule of decision on the question is identical with the New York rule:

The rule is well stated in *Elberts* v. *Carpenter Production Co.*, Civ. App. 256 S. W. 2d 601, err. ref. no rev. error:

> "In order to recover money conditionally promised, promisee must prove that condition has happened, or, if happening of condition depends upon promisor's performance and promisor has refused to perform, that condition would have happened if promisor had done what he agreed to do.

> "Where occurrence of condition upon which liability is conditioned is prevented by promisor's deliberate act or negligence promisor will be held absolutely bound to give promised performance."

In the following Texas decisions, the rule was stated to be a universal maxim:

> *Miller* v. *Hodges* (Tex. Com. Apps.), 260 S.W. 168, 172;
> *Sanderson* v. *Sanderson*, Com. Apps., 109 S.W. 2d 744, affirming Civil Appeals, 82 S.W. 2d 1008;
> *Dodds* v. *Wedegartner*, Civ. App. 69 S.W. 2d 164;
> *Hoffman* v. *Overton Refining Co.*, Civ. App. 110 S.W. 2d 93.

In the *Dodds* case it was held:

> "Recovery may be had as if act had been performed under contract where party in whose favor act was to be performed prevented performance and other party was not in default."

The Court held that plaintiff may recover *on the contract* where performance is wrongfully prevented by the other party, *or on a quantum meruit* at his election.

CONCLUSION

The disregard of law by the United States Court of Appeals, on the uncontradictable facts, denies petitioners their Constitutional rights.

The substitution of the personal philosophy of the judges, for the law is a travesty upon the law, and a tragedy to petitioners, and warrants correction by the powers of this Court.

The unopposed testimony of petitioners' three expert witnesses shows that the minimum normal fees in New York for providing the purchasers (Keljikan Commer-

cial Corporation), as promised by defendants, was ten per cent of the promised purchase consideration, or $454,000. Petitioners' services were of unique and special value to defendants as proved by their subsequent need to sell the *whole* interest in the concession to others for only $1,500,000 cash plus $1,500,000 payable only from ½ of the expected net profits from the concession, contrasted with the rate of $6,060,000 at which a half interest was sold to the Keljikans for $3,030,000. (R. 439-42, 446-52, 454, 492, 526-29, 530-32, 539-42, 800-8, 1480, 1840; Pp. 87-93 "Appendix and Brief for Appellants' in Court of Appeals.)

It is therefore prayed that the Court will issue its writ of certiorari to prevent the denial of a Constitutional right and to prevent a manifest injustice.

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